THE EFFECT OF SECTION 12 OF THE CANADA EVIDENCE ACT UPON AN ACCUSED*

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The purpose of this paper is to show that the provisions of s. 12 of the Canada Evidence Act[1] adversely affect an accused and can hinder his fair trial.

> S. 12(1) of the Canada Evidence Act reads as follows:
> A witness may be questioned as to whether he has been convicted of any offence. and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

In order to understand why this section was enacted, it is necessary to trace its historical development. Prior to 1843 any person who had been a convicted criminal was an incompetent witness. In that year an act was passed in England providing that no person offered as a witness shall be excluded by reason of "incapacity from crime".

This same provision is now contained in s. 3 of the Canada Evidence Act which reads:

> A person is not incompetent to give evidence by reason of interest or crime.

The fact that a witness has been convicted of crime now affects only his credibility, but not his competence.

At common law a witness may always be questioned, or evidence may always be given, concerning his general character. This would be done by calling other witnesses to prove a general reputation of bad character.

However, there is a general rule that a witness cannot be contradicted on irrelevant matters. The statute makes former criminals competent witnesses. The fact of the previous conviction is irrelevant to the issue. A witness, therefore, could be questioned as to a previous conviction, presumably as affecting credibility, or character, but, if he denied the conviction, his denial was conclusive. At common law his denial could not be contradicted, unless it was relevant to the issue, as where it showed design, or the like.[2]

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1 R.S.C. 1952, c. 307.

2 See *Regina* v. *Burke* (1858), 8 Cox C. C. 44 (C.C.A.).

Once character is an issue, questions pointing to credibility can be asked, even if they suggest that the accused person has been convicted of, or charged with, another offence. At common law, however, the prosecution was bound by the answer of the accused.

To get around the difficulty of a witness with a previous criminal record being asked questions concerning previous convictions as a test of credibility, and the examiner being confined to the denial by the witness since previous convictions were irrelevant to the issue, the English Parliament enacted the Criminal Procedure Act of 1865.

This was followed in Canada shortly after Confederation by s. 65 of the Dominion Procedure in Criminal Cases Act,[3] which reads as follows:

> A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction, and a certificate as provided in section twenty-six, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate.

The provision was continued in the Revised Statutes[4] with a slight modification.

It must be remembered that this was enacted before Canada had a Criminal Code. When a Criminal Code[5] was enacted in Canada in 1892, the same provision was included as s. 695. In 1906 the section was taken from the Criminal Code and placed in substantially the same form in the Evidence Act,[6] where it has remained ever since.

S. 12, as it reads, deals only with witnesses, and would appear to be harmless insofar as a defendant in a criminal case is concerned. It must be remembered that, when the section was first enacted, a defendant could not testify on his own behalf. The section clearly could not have contemplated an accused being questioned as to whether he had been convicted of past crimes.

The first decision on the effect of the English equivalent of our s. 12 was *Ward* v. *Sinfield*.[7] The Court ruled a party to a cause who gives evidence in support of the cause may be

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3 S.C. 1869, c. 29.
4 R.S.C. 1886, c. 174, s. 231.
5 S.C. 1892, c. 29.
6 R.S.C. 1906, c. 145, s. 12.
7 (1880), 49 L.J.Q.B. 696.

cross-examined as to whether he has ever been convicted of an offence. If he denies or refuses to answer, the opposite party may prove the conviction although the fact of conviction be altogether irrelevant to the matter in issue of the cause.

Lopes J. stated:[8]

> It seems to me that the construction we are now putting on the enactment is a reasonable one, for if a witness who has been convicted denies such a matter, which must be so clearly within his own knowledge, as well as obviously untrue, the jury ought to know it, in order they may understand the kind of witness they have before them.

Now the effect of s. 12 which applied only to witnesses, and not the accused who was still incompetent to give evidence, may have been very useful in challenging the validity of testimony. It was not until 1893 that the problem the subject of this paper came into being. This was the result of a new provision allowing an accused person to testify on his own behalf enacted in the Canada Evidence Act.[9]

This section read as follows:

> Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness . . .

It is the combined application of s. 4 providing that a defendant may testify and s. 12 with respect to past convictions which has produced the unfortunate situation that an accused who testifies may be examined on previous convictions.

In England s. 1 of the Criminal Evidence Act of 1898, which is still in force, has similar wording, but has important and material exceptions. S. 1 of this Act reads as follows:

> Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—
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> (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:
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> (b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:
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> (c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a wit-

8 *Ibid.*, at p. 697.

9 S.C. 1893, c. 31, s. 4.

ness in pursuance of the Act except upon the application of the person so charged:

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless —

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence:

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

The leading case on the effect of s. 12 indicates that the present state of the law was brought about by accident, and not by design. This is *Rex* v. *D'Aoust*.[10]

In this case it was argued that, when the Canada Evidence Act of 1893 was enacted making the accused a competent witness, it was not intended to allow him to be examined on previous convictions. The accused, being on trial, was on a different footing from an ordinary witness. He would be seriously prejudiced by proof of a previous conviction, while an ordinary witness is not so prejudiced.

The Court ruled, however, that the provisions of the Canada Evidence Act made no distinction between the accused and

10 (1902), 3 O.L.R. 653 (C.A.).

any other witness so far as liability to cross-examination on previous convictions was concerned. The Court noted that there was a fundamental distinction between the Canadian Act and the Imperial Evidence Act of 1893.

Rex v. *D'Aoust* was adopted and followed in *Rex* v. *Mulvihill*[11] and in *Rex* v. *Miller*.[12] In the latter case the Court, in applying *Rex* v. *D'Aoust*, stated:[13]

> . . . in Canada there is not the same limitation upon the right of cross-examination as in England.

The extreme application of s. 12 was reached in *Rex* v. *Dalton*[14] where the Court, purporting to follow *Rex* v. *D'Aoust* and *Rex* v. *Miller*, stated that s. 12 permitted cross-examination respecting charges on which the accused had been acquitted.

However, this was properly limited in *Koufis* v. *The King*[15] where Taschereau J. stated:

> The authority given to the Crown is to cross-examine the accused on *previous convictions*, but this s. 12 cannot be interpreted as meaning that the accused may be cross-examined on offences which he is suspected of having committed but for which he has not been convicted.

It is clear that the position of a defendant in England is much better protected than the position of a defendant in Canada. It is also obvious that s. 12 was originally enacted in relation to the credibility or character of a witness other than an accused. It is further clear that Canadian law has endeavoured to adhere to the position that the character of the accused may not be considered or dealt with unless he himself first raises the question. However, Canadian law has not protected an accused from the position that character is also a matter which affects credibility, and that previous prosecutions may be used to show bad character as a reasonable ground for lessening credibility.

The object of cross-examination is set out in *Rex* v. *Mulvihill*[16] where Phipson is cited as follows:

> In cross-examination a witness may be asked not only as to facts in issue, or directly relevant thereto, but all questions tending [inter alia] . . . (3) to impeach his credit by attacking his character antecedents, associations, and mode of life . . .

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11 (1914), 18 D.L.R. 189, 22 C.C.C. 354, 19 B.C.R. 197 (C.A.).

12 [1940] 4 D.L.R. 763, 74 C.C.C. 270, 55 B.C.R. 204 (C.A.).

13 *Ibid.*, at p. 764 D.L.R., p. 271 C.C.C., p. 207 B.C.R.

14 [1935] 3 D.L.R. 773, 64 C.C.C. 140, 9 M.P.R. 451 (N.S. Sup. Ct. in banco).

15 [1941] S.C.R. 481, at p. 490, [1941] 3 D.L.R. 657, at p. 664, 76 C.C.C. 161, at pp. 169-170.

16 (1914), 18 D.L.R. 189, at p. 195, 22 C.C.C. 354, at p. 361, 19

It is submitted that unless a previous conviction has to do with a charge of perjury, it does not directly affect credibility, but only indicates bad character which indirectly affects credibility. Therefore, we find the Canadian law in the position of not allowing the accused who is a witness to be attacked directly on character, but allowing him to be attacked indirectly on character by being questioned on previous convictions under the pretense that such questions relate solely to credibility and not character.

This is clearly a ridiculous and disturbing situation. Most lawyers would agree that questions as to previous convictions relate firstly to character and secondly to credibility.

It is interesting to learn what the courts have thought of the practical effect that s. 12 has on the defendant. This is illustrated by the statement of Bray J. in *The King* v. *Ellis*[17] referring to the effect of a question as to previous convictions:

> . . . in most cases the mischief is done by the asking of the question. The jury naturally assumes that no such question would be put unless there was foundation for it, and the more objection is made to it by the prisoner's counsel, the stronger to their minds becomes that assumption.

This feeling was affirmed in conversations between the writer and the trial judges of New Brunswick. One judge stated that any jury, being human, is affected and influenced by a defendant being asked questions concerning his previous convictions. The alleged offence may have no relation or bearing on the crime in question, but it does have a material effect on the jury.

When an accused is asked if he was convicted of a crime and he truthfully answers "yes", the result is not the view "he's honest by admitting his fault", rather it is the view "he's a scoundrel, being a criminal, and not to be believed".

In *Rex* v. *Roche*[18] the Court, recognizing the practicalities of life, stated:

> The likely effect if not the only effect, upon the jury men of this line of cross-examination, . . . would be that the accused was a person who was very apt to commit the crime with which he was charged . . .

The courts are recognizing the unfairness of this effect of cross-examination of the accused on previous convictions and

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B.C.R. 197, at p. 206 (C.A.).

17 [1910] 2 K.B. 746 (C.C.A.), at pp. 763-764.

18 (1949), 95 C.C.C. 270 (N.S. Sup. Ct.), at p. 286, quoting *Koufis* v. *The King*, [1941] S.C.R. 481, at pp. 486-487, [1941] 3 D.L.R. 657, at pp. 661-662, 76 C.C.C. 161, at pp. 166-167.

are attempting to institute rules to ameliorate the problem. In *Regina* v. *Gaich or Gajic*[19] the Court ruled that:

> When accused becomes a witness on his own behalf he may be cross-examined as to whether he has been convicted of any offence, the inquiry being relevant as effecting the credibility of the accused.

The Court continued with directions as to the proper use of such evidence:[20]

> Such admissions of the accused's previous record are admissible only as going to his credit and the trial Judge is under a duty to make clear to the jury, or in a trial without a jury to charge himself accordingly as to the limited effect of such evidence.

In *Rex* v. *Fushtor*[21] MacKenzie J. A., delivering the judgment of the Court, noted:

> It is also to be remarked that though the learned Judge properly told the jury that they should consider what value evidence of these convictions should have in connection with the prisoner's credibility, he did not direct them that they should not legally take it into account in determining whether he was guilty of the offence for which he was being tried. We think he should have cautioned them in this respect lest they might have assumed that it could be accepted as evidence that he was a bad man and possessed of a propensity or disposition to commit any kind of crime.

Clearly the courts are struggling to ameliorate the harshness of the existing situation by imposing special rules to be applied when an accused is cross-examined on his previous record.

The general rule is character should not be in issue, but that guilt must be decided on the factual evidence. But we now have the practical position that, if the accused does take the stand, character is immediately brought into issue under the guise of credibility.

Bearing in mind the weaknesses and frailties of juries, and even of trial judges, it is recommended that, to avoid any suggestion of improper trial, the Canada Evidence Act be amended to adopt the position of the English Act. S. 12 is without objection as it stands. However, s. 4, allowing an accused to give testimony, should provide those safeguards which are contained in the Criminal Procedure Act of England. This would restore the defendant in a criminal matter to the full protection of the principle that his character must not be brought into issue unless he raises the matter. It would prevent cross-examination on previous convictions unless the accused himself brings character into issue.

19 (1956), 116 C.C.C. 34 (Ont. C.A.), at p. 39, quoting headnote to *Rex* v. *Dalton*, [1935] 3 D.L.R. 773, 64 C.C.C. 140 (N.S. Sup. Ct. in banco).

20 *Ibid.*, at p. 39.

21 (1946), 85 C.C.C. 283 (Sask. C.A.), at p. 286.